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# In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

*v.*

UNITED STATES GYPSUM COMPANY, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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## REPLY BRIEF FOR THE UNITED STATES

### I

The United States contends that this case is governed by this Court's long-standing rule that an agreement among sellers to exchange information on current offering prices violates Section 1 of the Sherman Act if it has either the purpose or the effect of stabilizing prices. Respondents do not deny that an agreement intended to stabilize prices is illegal, but they argue that an agreement to exchange price information is legal if it had a valid purpose, no matter what its effect on price competition. They also make

various subsidiary arguments based upon that major premise. The premise is unsound, and the ancillary contentions are either unsupported by the record or fallacious.

A. Respondents assert (Jt. Br. 19–21, 44–45) that, under the indictment and the theory of the government's case at trial, the critical issue was whether respondents' purpose in exchanging price information was to fix prices, and that the district court improperly permitted the jury to convict if it found that, without regard to purpose, their agreement had that effect.

The indictment charged, the government contended, and the proof showed that respondents engaged in a conspiracy the purpose of which was to fix prices. As the court of appeals stated, there was evidence to support the government's claim that "the purpose of verification was to enable competitors to stabilize prices and 'police' agreed-upon increases, that the calls involved broad discussions of present and future pricing policies, that [respondents] verified daily, and that they continued to do so until 1973" (Pet. App. 12a; see U.S. Br. 10–16). Respondents' exchange of current price information was part of a comprehensive agreement among them and their co-conspirators to stabilize prices—as one of their executives put it, to "get the numbers up" (C.A. App. 961a–962a). This agreement was reflected in such actions as their 1965 and 1966 agreements to eliminate discounts and extended credit terms (U.S. Br. 20–33), their concerted elimination of various packaging and



handling services previously provided to customers (*id.* at 43–46), and their predatory practices against overly competitive smaller producers who refused to cooperate in existing practices (*id.* at 16–20, 46–47).

The government, however, also consistently contended that respondents' agreement had the effect of stabilizing prices at noncompetitive levels, and thereby fixing prices. The indictment (I A. 35–36), the bill of particulars (I A. 37) and the government's proof all challenged the effect as well as the purpose of the agreement. The district court, as the United States requested (IV A. 1888), instructed the jury that it could convict if it found beyond a reasonable doubt that the agreement was for the purpose of stabilizing prices or if, regardless of purpose, in fact it raised, fixed, maintained or stabilized prices (IV A. 1720–1722). Thus, from indictment through final instructions, not only the purpose but also the effect of the agreement was placed in issue. There was therefore no variance or inconsistency between the indictment and the proof.

The government's evidence of the stabilizing effect of respondents' agreement showed that for at least three years respondents were able to raise prices nationwide, establish identical credit terms, and reduce delivery services, despite industry overcapacity and declining demand (see U.S. Br. 47–48). Respondents attempted at trial to show that there was no such effect. They renew that contention in this Court, claiming that there was "vigorous price competition before and during the statutory period" (Jt. Br. 5).

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It is perhaps a sufficient answer that the jury credited the evidence of the government and not that of respondents. In any event, respondents' claim of "vigorous nationwide competition" in prices (Jt. Br. 10–11) is unsound.

Respondents' claim of "rampant price competition" is based on the testimony of their expert, Dr. Cyert, that there was a wide range of prices and discounts in the market (Jt. Br. 9; III A. 1315, 1367).[1] Dr. Cyert also testified, however, that truly competitive pricing tends to narrow the spread in prices (III A. 1367). The logical conclusion to be drawn from Dr. Cyert's testimony thus is that respondents' conduct was not truly competitive.

Respondents fail to give sufficient weight to the effect of the single-plant producers; they imply that those producers were a significant competitive factor only when they were directly competing for particular sales (Jt. Br. 6 and n. 12). But, as USG itself well understood, the competition of the single-plant producers had a spillover effect throughout a market (V A. 2410).[2] Dr. Cyert ignored the impact of

[1] Although respondents contend that the government's economist, Dr. Miller, did not dispute Dr. Cyert's data or conclusions (Jt. Br. 5 n. 7), they are mistaken. For example, Dr. Miller exposed a serious flaw in Dr. Cyert's data, showing that a proper analysis would undermine respondents' claim of "disorderly" competition. Compare III A. 1319 with III A. 1601. Dr. Cyert's exhibits combined three periods during which different list prices were in effect.

[2] Thus, respondents' statistics showing more price cuts in response to each other's price competition than to that of the single



single plant producers because it was "not relevant" (III A. 1367). But respondents' actions demonstrated their concern about that competition, and the evidence showed that prices remained high in areas and on products not subject to single plant competition (see U.S. Br. 47).

Moreover, respondents also ignore the other aspects of their conspiracy, such as the restrictions on credit and shipping practices. See U.S. Br. 47–49.[3]

Respondents contend that they stopped "verification" between early 1969 and 1972 (Jt. Br. 11–12).

plant producers (Jt. Br. 6 n. 12) ignore the fact that although, for example, USG may have granted a discount to meet a price of National, National may have offered the lower price to meet or forestall price competition from an active single plant competitor. See V A. 2410, an internal U.S. Gypsum document stating that "their [the single plants'] price cutting activity adversely effects the price and profit results of the total industry and the market in which all compete."

Respondents' contention that G–P was an aggressive price cutter through its warehouse sales from the time it entered the gypsum board market in 1965 (Jt. Br. 6–7) also is rebutted by G–P's own internal documents. They show that G–P itself was concerned about possible "general price deterioration" (IV A. 2258; V A. 2558), and took great care to avoid it (IV A. 2251). For example, in response to complaints from National, it imposed a minimum 5 percent mark-up over dealer prices for sales from its branches, and published that fact for the benefit of its competitors. In order to eliminate concern that it would seek to increase its market share, it deliberately avoided initiating price competition (V A. 2557) and strongly deprecated "chiseling prices" by its competitors (VI A. 3114).

[3] For example, USG reached its peak in outstanding credit to customers in 1965, but its decline in that respect did not stop in

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They thereby acknowledge that their agreement extended, if only briefly, into the statutory period. The evidence, moreover, shows that not only verification but other anticompetitive practices extended well into the statutory period (U.S. Br. 48–49).

B. In support of their contention that an agreement to exchange current price information, even if it in fact stabilizes prices, does not violate Section 1 of the Sherman Act if it is prompted by a good motive (Jt. Br. 21–30, 44–46), respondents cite this Court's statement in *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238, that the intent of an agreement is relevant to the determination of its legality.

Proof of an anticompetitive intent is sufficient to establish a violation of Section 1. This Court has never held, however, that such proof is an indispensable element of a Section 1 violation. Indeed, more than 50 years ago, in the very case respondents cite, the Court held that "[t]he true test of legality" is whether an agreement "promotes competition or whether it * * * may suppress or even destroy competition." *Id.* at 238. The Court explained that purpose is relevant "not because a good intention will have an

(Continued)

1968; indeed, it was steepest between 1969 and 1972 (V A. 2739; C.A. App. 2067ex). Respondents' contention that their agreement on credit terms ended before the statutory period (Jt. Br. 3 n. 3) is unconvincing. The evidence of agreement on establishing and maintaining credit terms is strong. See U.S. Br. 31–35, 40–42, 48; see also, for example, the virtually identical statements by USG and Celotex (C.A. App. 591ex and C.A. App. 2461ex–2464ex).



otherwise objectionable regulation or the reverse," but because intent may help "predict consequences." Thus by 1933 it was well established that "[g]ood intentions will not save a plan otherwise objectionable." *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 372.[4]

This Court's decisions dealing with price exchange agreements recognize that either the purpose or effect of the agreement may make it illegal. In *American Column & Lumber Co.* v. *United States*, 257 U.S. 377, the Court framed the issue as whether the agreement had either the purpose or effect of stabilizing prices. In *United States* v. *American Linseed Oil Co.*, 262 U.S. 371, the combination was held illegal because it had the "necessary tendency" to suppress price competition. In *Maple Flooring Manufacturers Association* v. *United States*, 268 U.S. 563, 585, the Court noted that the illegality of the agreement in those earlier cases arose not because of unlawful intent, but from the inference "that concerted action had resulted, or would necessarily result, in tending arbitrarily to lessen production or increase prices." In *Maple Flooring* itself the focus of inquiry was not on purpose, but

[4] This rule also disposes of respondents' argument (Jt. Br. 45–46) that the district court unlawfully created an irrebuttable presumption against them. The court did no more than charge that if the jury found that the agreement stabilized prices, respondents' supposed good purpose would not validate it. This was correct. The court's phrasing of this principle in terms of a presumption did not prejudice respondents. See *United States* v. *Patten*, 226 U.S. 525, 543. See, also, *Patterson* v. *New York*, 432 U.S. 197; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 22–24.

on the overall economic effect of the information exchange.[5]

In *Cement Manufacturers Protective Association* v. *United States*, 268 U.S. 588, upon which respondents place extensive reliance (Jt. Br. 25), the Court noted early in its discussion of the exchange of information on prices and transportation charges that "the Government does not rely on any agreement or understanding for price maintenance" (*id.* at 605), and it concluded that the agreement had no anticompetitive effect. *Id.* at 605–606.[6] The subsequent cases respondents cite (Jt. Br. 25) as approving price information

[5] Contrary to respondents' contention (Jt. Br. 24), in *Maple Flooring* this Court did not require proof of unlawful purpose; it reversed the district court only because it found neither "agreement" nor "concerted action" toward an illegal end. 268 U.S. at 586. Moreover, the Court emphasized that the information exchanged related solely to past transactions, neither buyer nor seller was identified, and the data was "published in trade journals which are read by from 90 to 95% of the persons who purchase the products of Association members." *Id.* at 573–574. The Court warned, however, that "[f]ree competition means a free and open market among both buyers and sellers." *Id.* at 583. Informing buyers of discounts or price reductions granted to others will obviously cause them to demand the same treatment. Respondents' secrecy here prevented this pro-competitive effect. See U.S. Br. 10–11, 79.

[6] In *Cement* the government charged a multifaceted conspiracy which included: (1) limiting the supply of low cost cement reaching the market by the concerted use and enforcement of specific job enforcement contracts; (2) distributing freight rate books with arbitrary basing points; (3) exchanging credit information in a manner which effectively resulted in a blacklist; and (4) exchanging information on prices for each specific job contract pursuant to the concerted enforcement program, with the result



exchanges provide no greater support for their position.[7]

of stabilizing prices. This combination allegedly resulted in uniformity of prices and elimination of competition. See Brief and Argument on Behalf of the United States, October Term, 1924, No. 551, pp. 70–80, 86–95, 111–127, 128–131, 215.

The Court's opinion in *Cement* discussed more than the price information exchange, and the context of each of its statements is essential to understanding the decision. The first passage respondents cite, for example, relates not to the exchange of price information, but to concerted enforcement of the limitations in specific job contracts. The Court found that neither the use nor the enforcement of specific contracts was itself conspiratorial; under such circumstances, the concerted gathering of information which each seller could use individually to enforce his contractual rights against fraud by buyers did not violate the antitrust laws. 268 U.S. at 603–604. It then held that the dissemination of information on a potential buyer's credit worthiness, also as a means of protecting against fraud, was not illegal. *Id.* at 604. Those were its only references to fraud. Only then did the Court consider the exchange of information on prices and transportation charges, and, as noted above, it held them lawful because they had no effect of stabilizing prices, as opposed to producing price uniformity. *Id.* at 604–606.

[7] *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553, 599, concluded that an unreasonable restraint "cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them." The Court approved the open announcement of prices and terms in the industry, but only after finding that the effect as well as the purpose of such announcements was beneficial to competition. *Id.* at 601. In *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, the Court noted in passing the abstract proposition that some trade associations may have "lawful ends" (presumably including collection of sales data), but directed the dissolution of the Glass Container Association. Finally, *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, held no more than that price information exchanges are not *per se* illegal. *Id.* at 45–46.

In light of this consistent precedent, it is hardly surprising that this Court in *United States* v. *Container Corp. of America*, 393 U.S. 333, held, without examining the lawfulness of defandants' purpose, that a price exchange agreement that in fact stabilized prices constituted price fixing in violation of Section 1 of the Sherman Act. The sellers in that case, like the defendants here, claimed that their good purpose (to prevent buyer fraud) justified their price exchange agreement, and the district court agreed with them. Nonetheless, this Court, acting solely on the basis of the stabilizing effect of the agreement, reversed. *Id.* at 336–338. Indeed, even the three dissenting justices (who concluded that the government had not proved effect), recognized that if an agreement to exchange prices had "the purpose or effect" of "restricting" or "restraining" price competition (*id.* at 340, 341), it violated Section 1.

C. Respondents also argue that, despite a proven stabilizing effect on prices, their price exchange agreement was valid because one of its purposes was the prevention of "customer fraud" (Jt. Br. 39–43). Both the district court and the court of appeals fully considered and properly rejected that contention (IV A. 1754, 1750; Pet. App. 19a n. 9, 54a).[8]

[8] The district court was explicit, denying respondents' request for an instruction that the purpose would justify respondents' actions, because it "is not, so far as I am concerned, the law at all" (IV A. 1754). It had similarly ruled previously in granting the government's requests to charge and denying those of the respondents (IV A. 1609, 1888, 1858–1859).



Central to respondents' claim of an intent to prevent "customer fraud" was their characterization of buyers' misstatements of lower priced offers as fraud. See, *e.g.*, respondents' supplemental request for charge (IV A. 1744–1745); see also, Jt. Br. App. 58 n. 53. It was just this kind of buyer bargaining that the sellers unsuccessfully urged this Court in *Container* to treat as justifying a price exchange agreement which stabilized prices. As the court of appeals correctly stated in this case, "the *Container* opinion makes it clear that mere bad faith bargaining does not amount to 'fraud' in the *Cement Manufacturers* sense" (Pet. App. 19a n. 9).

In an attempt to bring this case within *Cement*, respondents claim that their exchanges of information concerning job price protection were intended to prevent fraudulent procurement of "excess" lower-priced board (Jt. Br. 40–41). They assert that customers "sometimes misrepresented to other suppliers that they had not received such protection * * *" and thus "received" two or three times the amount of lower-priced board to which they were entitled (Jt. Br. 40 n. 53). The record, however, shows that verification concerning job price protection took place only when the customer represented that other suppliers had offered such protection (see C.A. App. 1086a, 1088a; U.S. Br. 21–23, 36–37). Moreover, respondents did not limit their claimed justification based upon alleged customer fraud to price protection, but broadly contended that verification was permissible to deal generally with

lying buyers (see, *e.g.*, IV A. 1744–1745) (defendants' request for supplemental instruction).[9] Such a broad purpose, as the Court made clear in *Container,* will not legitimate a price exchange agreement that stabilizes prices.

## II

There is no conflict between the Sherman Act and the Robinson-Patman Act of the kind that has led this Court to find implied exemptions in the past. See *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719. Even respondents recognize that compliance with both statutes is possible (Jt. Br. 34)

Respondents contend, however, that it will enhance competition if sellers' intent to comply with the Robinson-Patman Act immunizes from the Sherman Act agreements that actually stabilize prices. Respondents argue, in other words, that competitors' agreements with proven anticompetitive effects (and such effects were proven here) should be tolerated in order to enhance competition.

This contention is unsound not only in the context of this case but as a general proposition of economics. As we explained in our main brief (U.S. Br. 74–75, 77–79, 90–93), it is the undisclosed initiation of price reductions, not the meeting of them, that brings public benefit, and "verification" of the kind practiced here has a particularly stultifying effect on the initiation of price reductions. Cf. *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 523.

[9] See also Jt. Br. 39, last three lines.



Respondents' claim that without antitrust immunity the seller is compelled " 'to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition' " (Jt. Br. 36) is unpersuasive. First, respondents exaggerate what Section 2(b) of the Robinson-Patman Act requires of a seller (Jt. Br. 33–36). Contrary to respondents' implication (Jt. Br. 34), neither the Federal Trade Commission nor any court has ever stated, let alone held, that price discussion with a competitor is necessary to establish good faith. See U.S. Br. 85–88; ABA, Section on Antitrust, *Antitrust Law Developments,* 145 n. 241 (1975). The actions that will establish a seller's good faith belief that he is meeting competition necessarily will depend on the facts of each transaction. But there are a sufficient number of other ways in which a seller can evaluate a customer's claim of a lower offer—apart from agreed price exchanges with a competitor—to avoid the acute dilemma that respondents depict.[10]

Second, the claimed dilemma is illusory, as respondents' own conduct demonstrates. If respondents were truly concerned with the loss of individual sales, because of price cutting by competitors, they would not have given to competitors the very information that assists their competitors in taking sales away. In fact,

[10] See U.S. Br. 69, 86–87. Useful information that a seller could obtain would include the size of the reported price cut, the frequency of reports of such price cutting, the buyer's reputation for truthfulness, and the existence of documentation of the reported offer.

in those few instances where a gypsum company was anxious to make a particular sale because of its effect on profits, it often did not exchange price information on that sale (I A. 336–338, 511; III A. 1460–1462).

## III

Respondents also seek to sustain the judgment of the court of appeals on the basis of alleged errors in jury instructions and alleged jury coercion (Jt. Br. 55–81). As we pointed out in our main brief (U.S. Br. 95), none of these claims convinced a majority of the court of appeals, and none has merit (U.S. Br. 94–107). Nonetheless, because respondents have argued at length that the jury was coerced, we comment further on that point.

Respondents contend that the judge coerced the jury into returning a verdict by: (1) forcing deliberations when the jurors were ill and exhausted: (2) repeatedly giving the so-called "modified *Allen*-type" "dynamite" charge; and (3) supposedly stating in his colloquy with the jury foreman that the jury should reach a verdict "one way or the other" (Jt. Br. 66–81.) All the judges of the court of appeals, however, correctly rejected the first two of these contentions [11] and

[11] Even Judge Adams, who thought the jury was coerced, rejected respondents' contentions concerning the fatigue of the jury and the supplemental charge on trying to reach a verdict (Pet. App. 45a). Respondents mischaracterize that charge as a "dynamite" charge. In fact, the Third Circuit approved the instruction in *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom Panaccioni* v. *United States*, 396 U.S. 837, precisely because it is not a "dynamite" charge. Although it tells the jurors to consider the views of others on the panel, it also admonishes them not to surrender their own individual convictions.



only Judge Adams agreed with the contention of coercion resulting from the conversation with the foreman."[12]

Respondents' claim thus boils down to a contention that the judge coerced the jury when, in response to the foreman's statement that "[y]ou are after a verdict one way or the other," he stated: "[w]hich way it goes doesn't make any difference to me" (IV A. 1840). The most, however, that this remark implies is that the judge told the foreman that he preferred a verdict to a hung jury. This was proper. The trial had been long and costly, and the judge could insist on further deliberations before declaring a mistrial.

The question whether this statement can fairly be said to have had such a coercive effect on the jury as to require reversal of the convictions. The final words the judge spoke to the foreman, which constituted his directions, were: "You tell them to keep deliberating and see if they can come to a verdict" (IV A. 1840). This advice was proper, and it could not have coerced the jurors, whom he had three times earlier directed not to surrender a conscientious opinion merely to reach a verdict (IV A. 1767, 1815, 1818).

Indeed, after the foreman returned to the jury room, the jury deliberated for probably eight more

[12] Respondents suggest that the court erred in meeting with the foreman alone (except for a court reporter) (Jt. Br. 76–77). But all the defendants explicitly consented to the private meeting (IV A. 1822–1825). The case is thus unlike *Rogers* v. *United States*, 422 U.S. 35 ,41, where the trial court communicated with the jury without informing counsel.

hours before announcing that it had reached a verdict (IV A. 1829).[13] This interval sharply contrasts with the situation in *Rogers* v. *United States*, 422 U.S. 35, where five minutes after the judge had sent the note to the jury, it returned a guilty verdict (*id.* at 37). Moreover, every juror later confirmed the verdicts; each was polled three separate times and each affirmed that he freely and fully subscribed to the verdicts (Tr. 15,183–15,191).[14] There is thus no reason to believe that the verdict was the result of coercion.[15]

[13] The jury resumed its deliberations after the meeting between the judge and foreman on July 14, 1975, at 12:04 P.M. (IV A. 1826) and presumably deliberated until 6:30 P.M. (IV A. 1812). It reconvened the next morning, presumably at 8:00 A.M. (IV A. 1810), and announced its verdict at 10:45 A.M. (IV A. 1829).

[14] The contention of respondent Celotex that the court erred in not allowing the interrogation of jurors (Cel. Supp. Br. 4–12) is based principally on the argument that the ill health of some jurors coerced a verdict, and on a variation on the respondents' main theme that the judge's statement to the foreman was coercive. (Cel. Supp. Br. 6–7). As we have shown, neither argument has merit.

[15] Both the respondents' joint brief (pp. 50–55) and respondents Brown and Nicely's supplemental brief (pp. 4–11) argue that their conviction constituted an impermisible retroactive application of a new legal principle announced in this case. We have answered that contention in our reply memornadum to the brief in opposition in this case (pp. 3–4) and in our brief in opposition to the petition for certiorari filed by Brown and Nicely in No. 76–1556 (pp. 10–11). We have furnished copies of the latter document to counsel for respondents in this case.

Respondents Brown and Nicely argue in their supplemental brief (pp. 11–29) that the court of appeals should have directed their acquittal for insufficiency of the evidence instead of remanding for a new trial. That issue is presented in Brown and Nicely's petition for certiorari in No. 76–1556 (pp. 20–24), which the Court apparently is holding pending its decision in this case. If the Court accepts our arguments here and reverses the judgment of the court of appeals, the case will have to be remanded for that court to consider a number of other contentions it has not yet decided. On such remand, Brown and Nicely may argue that an acquittal rather than a new trial is the proper disposition of their appeals. There is no occasion for this Court, however, to consider the question in this case. See U.S. Br. 72–73, n. 68.



## CONCLUSION

For the foregoing reasons and those set forth in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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